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In The

Supreme Court of the United States

October Term, 1996

RONALD W. HUGHES, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, to support convictions under the money laundering statutes, 18 U.S.C. §§ 1956 and 1957, the government must prove that the defendant knew that he or she was dealing with proceeds of a particular form of unlawful activity?

II. Whether a trial court's failure to instruct the jury on an essential element of the crime charged constitutes "structural error" mandating reversal by the court of appeals?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Ronald W. Hughes, Sr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on October 30, 1996.

OPINIONS BELOW

The judgment and opinion of the Court of Appeals for the Fifth Circuit is unpublished and is reproduced in the Appendix hereto at pages App. 1-27.

JURISDICTION INVOKED

The district court had jurisdiction over the underlying federal criminal action pursuant to 18 U.S.C. § 3231. On September 18, 1995, petitioner was adjudged guilty and sentenced on one count of conspiracy to commit violations of 18 U.S.C. § 1956(a)(1)(B)(i), two counts of violating 18 U.S.C. § 1956(a)(1)(B)(i), and two counts of violating 18 U.S.C. § 1957. Petitioner filed a notice of appeal that same day. The Court of Appeals for the Fifth Circuit therefore had jurisdiction over petitioner's appeal pursuant to 28 U.S.C. § 1291.

On October 30, 1996, the court of appeals entered its judgment affirming petitioner's convictions and sentence. The jurisdiction of this Court to review the judgment and

order of the court of appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

This case involves section 1956 of Title 18, which provides in relevant part:

> **§ 1956. Laundering of monetary instruments**
>
> **(a)(1)** Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –
>
> > **(B)** knowing that the transaction is designed in whole or in part –
> >
> > > **(i)** to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity [shall be guilty of a crime].
>
> . . . .
>
> **(c)** As used in this section –
>
> **(1)** the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented the proceeds of some form,

> though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is [specified unlawful activity]. . . .

18 U.S.C. § 1956(a)(1)(B)(i) and (c)(1).

This case also involves section 1957 of Title 18, which provides in relevant part:

> **§ 1957. Engaging in monetary transaction in property derived from specified unlawful activity**
>
> **(a)** Whoever . . . knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity [shall be guilty of a crime].
>
> . . . .
>
> **(c)** In a prosecution for an offense under this section, the Government is not required to prove that the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

18 U.S.C. § 1957(a) & (c).

Finally, the case involves the Due Process Clause of the Fifth Amendment, which provides in relevant part: "No person . . . shall be deprived of life, liberty, or property without due process of law. . . . " U.S. Const. Amend. V.

STATEMENT OF THE CASE

On March 9, 1994, petitioner Ronald W. Hughes, Sr. ("Hughes") and co-defendants Betty L. Allen, Ronald W. Hughes, Jr., and Jerri D. Allen were indicted in the United States District Court for the Northern District of Texas, Dallas Division, Cause No. 3-94-CR-075-X, the Honorable Joe Kendall presiding. Hughes was named in thirteen of the seventeen counts of the indictment. Count 1 charged Hughes and the other defendants with conspiracy to commit 18 U.S.C. § 1956(a)(1)(B)(i) money laundering offenses, in violation of 18 U.S.C. § 371. Counts 2, 4, and 5 charged Hughes and defendant Betty Allen with substantive money laundering offenses, in violation of 18 U.S.C. § 1956(a)(1)(B)(i). Counts 7 and 16 charged Hughes with engaging in monetary transactions in criminally derived property, in violation of 18 U.S.C. § 1957. Counts 8 through 14 charged Hughes with structuring financial transactions to avoid title 31 reporting requirements, in violation of 31 U.S.C. § 5324(a) & (c) and § 5322(b).

The defendants' jury trial began on April 3, 1995. On April 24, 1995, the jury returned a verdict acquitting Hughes on Count 2 (one of the § 1956 counts) and Counts 8 through 14 (the structuring counts). However, the jury convicted Hughes on Count 1 (the money laundering conspiracy count), Counts 4 and 5 (two of the § 1956 counts), and Counts 7 and 16 (the § 1957 counts). All of these convictions, including the conspiracy conviction, will hereinafter be referred to as "the money laundering convictions." On September 18, 1995, the court sentenced Hughes, who is 63 years old, to 165 months imprisonment and a $500,000 fine.

Hughes appealed his convictions and sentence to the United States Court of Appeals for the Fifth Circuit. On October 30, 1996, the court of appeals issued an opinion upholding the Hughes' convictions and sentence in their entirety. (App. 1-27).

I. Facts and Procedural Events Related to Issue I of this Petition

Issue I of this Petition concerns the correct interpretation of the key element the government must prove to achieve a conviction under the money laundering statutes – that the defendant knew that he or she was dealing with "proceeds of some form of unlawful activity" (in the case of 18 U.S.C. § 1956(a)(1)) or that the defendant knew he or she was dealing with "criminally derived property" (in the case of § 1957). More specifically, Issue I concerns whether the government must prove the defendant harbored some reasonably specific notion of the *type of crime* constituting the source of the funds at issue (for example, that the funds were derived from illegal drug activity) or instead, as the court of appeals held below, that the government need only prove that the defendant harbored the idea that he or she was dealing with "tainted" funds, without any notion of a particular type of criminal activity constituting the source of the funds.

The evidence at trial with respect to this issue – *i.e.*, Hughes' knowledge of the nature of the funds he was dealing with – is accurately set forth in Part I of the court of appeals' opinion (App. 2-6 hereto) and therefore will not be reiterated in detail here. However, we will emphasize the court of appeals' stated rationale for its legal

conclusion that such evidence was sufficient to support a finding, beyond a reasonable doubt, that Hughes' mental state with respect to the nature of the funds he was dealing with rose to the level necessary to support his money laundering convictions. This rationale is set forth in Part III.A of the opinion (App. 15-17). It is important to read the court of appeals' opinion in Part III.A in the context of the courts' description of the evidence in Part I, because doing so reveals the *erroneous legal standard* upon which the court of appeals' upheld Hughes' convictions and which is the subject of Issue I of this Petition.

The court of appeals pointed to the following evidence to support its legal conclusion that the evidence was sufficient with respect to Hughes' knowledge of the nature of the funds at issue: (1) he received the funds in cash; (2) he received $2 million of the funds at a storage facility in the Phoenix area; (3) the explanation given to Hughes as to the source of the funds – the "Joe Brown story" – was one that the jury was entitled to disbelieve (and therefore, ostensibly, Hughes also should have disbelieved); and (4) upon receiving the funds, Hughes deposited them in his bank accounts in a manner designed to avoid the government learning that the funds were in his possession.

In addition, the court of appeals pointed to evidence of an August 8, 1989 meeting between Hughes and Glyn Robert Chambers, the man whom the government alleged was a drug dealer and the actual source of the funds. During that meeting, Chambers told Hughes that he (Chambers) "had once worked for a man named Pablo Acosta, that he had inherited Acosta's 'turf,' and that Acosta was 'like a godfather' to Chambers." App. 17 n.8.

Significantly, however, the court of appeals did not point (nor could it have pointed) to any evidence that Hughes had knowledge that the funds were the proceeds of *illegal drug activity*, or, for that matter, any other particular crime. This was despite the fact that the government's theory throughout the trial below was that Hughes believed that illegal drug activity was the source of the funds with which he was dealing. Indeed, the government never even posited (much less offered evidence of) a belief on Hughes' part that he was dealing with funds derived from a form of unlawful activity other than illegal drug activity.

The court of appeals' legal conclusion that a belief that funds are "tainted," without any belief as to a *type* of crime constituting the source of the funds, is enough to constitute guilt under the money laundering statutes is made clear by the court's repeated use of the word "tainted," or words similar to that term, to describe what the evidence had shown with respect to Hughes' knowledge as to the source of the funds at issue. For example, the court of appeals held that the jury could have properly found that Hughes had knowledge (1) that the funds at issue were from a "criminal source" (App. 15), (2) that the funds were from "an illegal source," (App. 16), (3) of the "illegality of the proceeds" (App. 17), (4) of "the illegality of the monies being structured" (App. 17 at n.7), and (5) of the "illegality of the proceeds" (App. 18 at n.8).

At no point, in fact, did the court of appeals suggest that it was affirming Hughes' convictions because the evidence was sufficient to support a finding that he knew that illegal drug activity – or any other particular form of unlawful activity – was the source of the funds with

which he was dealing. Rather, the court clearly rested its affirmance of Hughes' convictions on its *legal conclusion* that the government may properly achieve convictions under 18 U.S.C. §§ 1956 and 1957, and conspiracy to violate those statutes, based merely on proof that the defendant harbored a belief that he or she was dealing with "tainted" or "criminal" funds.[1]

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[1] The court of appeals' opinion states that the issue raised by Hughes was whether "the government presented insufficient evidence of [Hughes'] actual knowledge of the *criminal taint* of the money involved." (App. 14) (emphasis supplied). This manifestly misstates the issue raised by Hughes. Point of Error II in Hughes' opening brief to the court of appeals stated: "ALL OF DEFENDANT HUGHES' CONVICTIONS SHOULD BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING THAT HE POSSESSED ACTUAL KNOWLEDGE THAT *ILLEGAL DRUG PROCEEDS* WERE INVOLVED." (emphasis supplied). (To make this clear, Hughes has reproduced at App. 28-29 hereto the first two paragraphs of his opening brief argument to the court of appeals with respect to this issue.)

In addition, at oral argument to the court of appeals the government effectively conceded that the evidence was insufficient to support a finding that Hughes knew that illegal drug activity, or any other particular form of unlawful activity, was the source of the funds at issue. Nonetheless, the government argued, Hughes' convictions were to be affirmed because the money laundering statutes did not require the government to prove that Hughes knew that the funds at issue came from any particular form of unlawful activity – that so long as there was evidence that he knew that he was "dealing with dirty money of some kind," his convictions were to be affirmed. The court directed that the parties submit supplemental briefing on this issue of the correct interpretation of the money laundering statutes. (continued)

As will be shown below in the argument section of this Petition, this legal conclusion constitutes a manifestly incorrect interpretation of the money laundering statutes, and this Court should grant certiorari to reverse that erroneous holding.

II. Facts and Procedural Events Related to Issue II of this Petition

One of the elements that the government was required to prove to support each of Hughes' money laundering convictions was that "specified unlawful activity" was, in fact, the source of the funds at issue. 18 U.S.C. § 1956(a)(1) and 1957(a). In this case, the alleged specified unlawful activity was the "importation, sale, or distribution of cocaine." (App. 11). Over Hughes' objection, the trial court refused to instruct the jury as to the elements of this alleged specified unlawful activity.[2] On

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The governments' supplemental brief to the court of appeals on this issue, which is reproduced at App. 30-33 hereto, demonstrates beyond doubt that the issue of statutory interpretation presented as Issue I of this Petition was before the court of appeals, and the court of appeals rested its opinion and judgment on that issue. (Because Hughes' own supplemental brief on the issue is somewhat lengthy, it is not reproduced here. However, should the government argue in response to this Petition that this issue of statutory interpretation was not before the court of appeals, or ruled on by the court of appeals, Hughes will provide his own supplemental brief to this Court in reply to the government's response.)

[2] The court of appeals' opinion states that Hughes did not submit a request to the trial court that it instruct the jury as to the elements of the alleged specified unlawful activity. (App. 11 at n.6). Again, the court of appeals mischaracterized the record.

appeal, Hughes raised this failure as a point of error requiring reversal on appeal. (App. 11-14).

In rejecting Hughes' contention, the court held that the trial court was not required to provide the jury with the elements of the "specified unlawful activity" which the government alleged was the source of the funds at issue. Although the court of appeals acknowledged that, in order to prove the charged money laundering offenses, the government necessarily was required to prove the existence of the alleged specified unlawful activity (including each of the elements of the alleged specified unlawful activity), the court of appeals held that the trial court had described such unlawful activity adequately to the jury by simply stating that such unlawful conduct was "any activity relating to the sale and distribution of controlled substances." (App. 12-13).

The instruction in this regard which Hughes proposed to the trial judge, which was contained in the record before the court of appeals, is reproduced hereto at App. 34. This proposed instruction demonstrates beyond doubt that Hughes *did* request that the jury be instructed as to each element of the alleged specified unlawful activity constituting the source of the funds at issue, and he did so with respect to the government's independent obligation to prove that specified unlawful activity in fact existed. In any event, the court of appeals purported to review the Point of Error under the "plain error" standard. (App. 11 at n.6). Because "structural error" requires reversal regardless of whether the defendant preserved the error at trial, *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991) ("structural" error is not subject to harmless error analysis and therefore requires reversal on appeal); *Rose v. Clark*, 478 U.S. 570-577-78 (1986) (same), whether or not Hughes preserved the error at issue here is immaterial to the issue raised in this Petition.

As will be shown in Part II of the argument section below, the trial court's failure to provide the elements of the alleged specified unlawful activity to the jury was structural error, requiring the district court to reverse Hughes' convictions.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant Certiorari to Decide Whether, to Support Convictions under the Money Laundering Statutes, 18 U.S.C. §§ 1956 and 1957, the Government must Prove That the Defendant Knew That He or She Was Dealing with Proceeds of a Particular Form of Unlawful Activity.

As previously shown, the court of appeals did not affirm Hughes's convictions on the ground that there was sufficient evidence to support a finding that he knew that the funds he was dealing with came from illegal drug activity or any other *particular* form of unlawful activity. Rather, the court affirmed his convictions on the ground that the evidence was sufficient to support a finding that he knew that the funds at issue were "tainted" or came from "crime in general." That interpretation of the knowledge elements of §§ 1956 and 1957 is manifestly incorrect, and this Court should grant certiorari to overturn that holding.

A. What Congress Intended in Enacting §§ 1956 and 1957.

Before addressing why Congress did *not* intend the interpretation of §§ 1956 and 1957 which was adopted by

the lower court in this case, it is helpful to show what Congress *did* intend in enacting the two statutes. The problem in interpretation arises principally from subsection (c)(1) of § 1956 and, to a lesser degree, subsection (c) of § 1957.

Subsection (c)(1) of § 1956 provides:

> (c) As used in [§ 1956] –
>
> (1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds of some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is [specified unlawful activity].

18 U.S.C. § 1956(c)(1). Subsection (c) of § 1957 provides:

> (c) In a prosecution for an offense under this section, the Government is not required to prove that the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

18 U.S.C. § 1957(c).

The only reasonable reading of §§ 1956(c)(1) and § 1957(c) is that the two statutory provisions were intended to eliminate two, but only two, defenses that a defendant otherwise guilty under the money laundering statutes might raise to escape liability. The most obvious defense eliminated by the two provisions is the potential claim that, although the defendant was aware that the

funds at issue came from a serious form of unlawful activity, he or she believed that such unlawful activity was a form of unlawful activity not among the list of federal crimes constituting "specified unlawful activity" as that term is defined in §§ 1956 and 1957. An illustration would be the defendant who deals with funds which are in fact the proceeds of illegal drug activity (a specified unlawful activity) but which, it is claimed, the defendant believed were derived from burglary (which is a felony under state law but not among the list of federal crimes constituting "specified unlawful activity" under §§ 1956 and 1957, *see* 10 U.S.C. §§ 1956 (c)(7) and 1957 (f)(3)). This defense is expressly eliminated by both § 1956(c)(1) and § 1957(c).[3]

The second defense Congress intended to eliminate through its enactment of §§ 1956(c)(1), and possibly 1957(c), is the potential claim that, although the defendant was aware that the funds at issue were derived from one of a number of *particular* forms of criminal activity, he or she was not sure exactly which of those particular forms of criminal activity the funds were in fact derived. An illustration would be the defendant who accepted funds from a third person with knowledge that such third person earned all of his or her income from illegal gambling activity, illegal drug activity, or both. The defendant thus knew that the funds came from some particular form

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[3] *See also* Senate Report No. 99-433, 99th Congr., 2d Sess. (1986), which provides in relevant part: "[§ 1956(c)(1)] will eviscerate the defense that defendant knew that the funds came from a crime, but thought the crime involved was a crime not on the list of 'specified' crimes in section (c)(7)." *Id.* at 12.

of serious unlawful activity (either illegal gambling or illegal drug activity), but simply was not exactly sure which of the two forms of unlawful activity the funds came from. This defense is eliminated by the express terms of § 1956(c)(1), which defines knowledge as dealing with funds knowing them to be "proceeds of some form, *though not necessarily which form*, of activity that constitutes a felony under State, Federal, or foreign law." (emphasis supplied).[4]

B. What Congress Did Not Intend in Enacting §§ 1956 and 1957.

It is clear that Congress did not intend, as the court of appeals held, that a person may properly be convicted under § 1956 or § 1957 based on a finding that he or she dealt funds knowing them to be "tainted" or "illegally derived" but without any belief as to a *particular form* of unlawful activity constituting the source of the funds. This is so for several reasons.

First and foremost, such a construction is completely at odds with the fundamental requirement that, to be guilty of a violation of § 1956 or § 1957, one must possess "actual knowledge" that he or she was dealing with proceeds of unlawful activity. In enacting sections 1956 and 1957, Congress expressly rejected law enforcement calls for lesser "reason to know" or "reckless disregard"

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[4] Unlike § 1956(c)(1), § 1957(c) does not *expressly* eliminate such a defense. Petitioner would concede, however, that such a defense is implicitly eliminated by the language of subsection (a) of § 1957.

scienter standards. S. Rep. No. 433, 99th Cong. 6-7 (1986). As one key member of Congress stated, the knowledge standard under sections 1956 and 1957 is "not 'should have known, might have known, a reasonable person would have known,' " it is "this person knew the source of the income." H.R. Rep. No. 855, 99th Cong., 2d Sess. 13-14 (1986) (quoting Representative Lundgren). Consistent with both the plain language of §§ 1956 and 1957, and their clear legislative history, the courts have unanimously held that the government must prove that the defendant possessed "actual knowledge" that proceeds of unlawful activity were involved to properly achieve convictions under sections 1956 or 1957. *E.g., United States v. Heaps,* 39 F.3d 479, 484 (4th Cir. 1994); *United States v. Campbell,* 977 F.2d 854, 857 (4th Cir. 1992), *cert. denied,* 507 U.S. 938 (1993); *United States v. Antzoulatos,* 962 F.2d 720 (7th Cir.), *cert. denied,* 506 U.S. 919 (1992); *United States v. Lora,* 895 F.2d 878 (2d Cir. 1990).

It is impossible for one to have "actual knowledge" of a fact unless the fact in question is defined with some reasonable degree of specificity. Defining the fact at issue as a vague notion that funds are "illegitimate," "tainted," or "come from crime in general" – without any belief as to *which* crime they come from – is flatly inconsistent with this principle.

Second, § 1956(c)(1) and § 1957(c)'s mandate that an individual must know that the funds at issue are proceeds of some *form* of activity "that constitutes a *felony* under State, Federal, or foreign law" also belies the idea that Congress intended that one can be guilty under the statute simply by believing that funds "come from crime" without any specific idea of the *form* of crime in mind.

Simply put, one cannot believe that funds are proceeds of a form of unlawful activity that "constitutes a felony" – as opposed to a misdemeanor – without some specific notion of the type of felony that is involved. A generalized belief that funds come from "crime," without any belief as to the type of crime, is a belief that makes no distinction between felony activity as opposed to misdemeanor activity, and therefore is a mental state Congress did not intend.

In this same vein, the lower court's interpretation of § 1956(c)(1) elevates the modifying clause "though not necessarily which form" contained therein to a level that eliminates the provision's more fundamental requirement that, to be guilty under the statute, one must know that "the property involved in the transaction represented proceeds of *some form* . . . of activity that constitutes a felony under State, Federal, or foreign law. . . . " The "though not necessarily which form" modifying clause in § 1956(c)(1) should be interpreted in a manner that makes it consistent with the phrase it modifies (*see* Part I.A above, pp. 13-14), not in a manner that renders the modified phrase meaningless.

Third, the lower court's holding that a defendant may properly be found guilty under the money laundering statutes based simply on his or her belief that funds were derived from an "illegitimate" source – without any knowledge or belief as to what crime constituted such "illegitimate" source – is tantamount to a holding that a defendant may properly be found guilty under the money laundering statutes because he or she dealt with funds without knowing them to be from a *legitimate* source. Congress, however, did not define the knowledge

element of §§ 1956 and 1957 as "not knowing" that the property involved represented the proceeds of "lawful activity"; rather, Congress defined the statutes' knowledge element as "knowing the property involved represents the proceeds of some form of unlawful activity." While the standard adopted by the lower court may be laudable in terms of how human beings ought to act, it does not reflect Congress's judgment concerning what type of conduct warrants the draconian criminal sanctions of the money laundering statutes. The lower court's attempt to rewrite §§ 1956 and 1957's language to conform to its own notion of what should warrant criminal sanctions should not be allowed to stand. *See United States v. Bass*, 404 U.S. 336, 348 (1971) ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.").

The court of appeal's construction of §§ 1956(c)(1) and 1957 not only is inconsistent with the plain language of those provisions, it is flatly contradicted by their legislative history. Senate Report 433, one of the two legislative documents accompanying § 1956 and § 1957 when they were enacted in 1986, explains the meaning of § 1956(c)(1):

> [In] order to fall within [§ 1956], the participant need not know that the property involved in the transaction represents the proceeds of "specified unlawful activity." He or she need only know that it represents the proceeds of some form of unlawful activity. *This distinction is drawn in order to prevent a defendant from escaping conviction by merely alleging that he or she thought the*

> *property involved represented the proceeds of a crime not covered in the term "specified unlawful activity."* It was reported to the Committee that such a defense has been successfully raised in other countries whose statutes do not draw the distinction drawn in this section and it is the Committee's intention to avoid that result.
>
> . . . .
>
> Section 1956(c)(1) sets out the definition of the phrase "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" as used in section (a) (1). As explained above, the significance of this phrase is that the defendant need not know exactly what crime generated the funds involved in a transaction, only that the funds are the proceeds of *some crime* that is a felony under Federal or State law. This will eviscerate the defense that the defendant knew the funds came from a crime, but felt the crime involved was a crime not on the list of [specified unlawful activity].

S. Rep. No. 433, 99th Cong., 2nd Sess. 11-12 (1986) (emphasis supplied).

Finally, two other well-settled principles of criminal jurisprudence require that the Court reject the court of appeals' construction of the knowledge elements of §§ 1956 and 1957.[5] First, even if the court of appeals'

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[5] The "knowledge element" of § 1956 concerns Mr. Hughes' convictions on Counts 1, 4, and 5. The "knowledge element" of § 1957 concerns Mr. Hughes' convictions on Counts 7 and 16. If anything, the "knowledge" element of 18 U.S.C. § 1957 should be interpreted even more narrowly than the "knowledge"

construction could somehow be construed as a "reasonable" construction of those statutes (which it cannot), the rule of lenity requires that the courts adopt the reasonable construction that is most favorable to the defendant. *McNally v. United States*, 483 U.S. 350, 359-60 (1987) (citing numerous cases). "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." *Id.*

And, even if it reasonably could be said that Congress intended the construction of §§ 1956 and 1957 that was adopted by the court of appeals in this case (which, again, it cannot), such a construction would surely violate the constitutional vagueness doctrine. It is difficult to imagine Congress creating a more amorphous and ambiguous mental state than, as the lower court held here, the belief that funds come from "some crime" but no particular crime. The courts are required to construe criminal statutes in a manner that does not violate the Constitution. There is no exception to this rule in the case of the mental state necessary for a conviction under the money laundering statutes. Indeed, it is only because the courts have been able to interpret the money laundering statutes in a manner that includes a *reasonably specific mental state* that has saved them from challenges on constitutional vagueness grounds. *See, e.g., United States v. Awan*, 966 F.2d 1415, 1424 (11th Cir. 1992) ("[T]he requirement that the Government prove that a defendant knew that the proceeds stem from *felonious activity* do[es] much to destroy any force in the argument that application of

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element of § 1956. *Compare* 18 U.S.C. § 1957(c) *to* 18 U.S.C. § 1956(c)(1).

[§ 1956] will be so unfair that it must be held invalid.") (emphasis supplied).

C. Why This Court Should Grant Certiorari to Overturn the Court of Appeals' Erroneous Holding.

Since the money laundering statutes were enacted in 1986, the Justice Department has filed thousands of cases across the country, and hundreds of reported decisions exist in the lower courts concerning these statutes. This Court, however, has yet to consider their implication or their reach.

The instant case presents the perfect opportunity for this Court to address the reach of the money laundering statutes. It is difficult to imagine a potentially broader application of the money laundering statutes than that which occurred here. We therefore urge the Court to grant certiorari in this case in order to provide guidance to the lower courts, the Justice Department, and the public concerning the meaning of these statutes.

II. This Court Should Grant Certiorari to Decide Whether a Trial Court's Failure to Instruct the Jury on an Essential Element of the Crime Charged Constitutes "Structural Error" Mandating Reversal by the Court of Appeals.

This Court recently granted certiorari to review the Eleventh Circuit's decision in *Johnson v. United States*, 117 S. Ct. 451 (Nov. 15, 1996). In that case, the trial court, without objection by the defendant, instructed the jury that an essential element of the crime of perjury – the

materiality of the alleged perjurious statement – was a question for the court, rather than the jury, to decide. The instruction constituted error under this Court's decision in *United States v. Gaudin*, 115 S. Ct. 2310 (1995). Nonetheless, in an unpublished opinion the Eleventh Circuit held that the error was not "plain error" mandating reversal pursuant to Rule 52 of the Federal Rules of Criminal Procedure. 65 U.S.L.W. 3209 (October 1, 1996). Among the questions presented to this Court by the petition in *Johnson* is as follows:

> Is reversal of perjury conviction required in case in which trial judge, not jury, decided essential element of materiality?

Id.

Accordingly, it appears that in *Johnson* this Court will decide whether a trial court's failure to submit an essential element of the crime charged to the jury is a "structural" error that *mandates* reversal on appeal, regardless of whether or not such error was objected to at trial. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991) ("structural" error is not subject to harmless error analysis and therefore requires reversal on appeal); *Rose v. Clark*, 478 U.S. 570-577-78 (1986) (same).

In the instant case, although acknowledging that the elements of the "specified unlawful activity" at issue are themselves elements of § 1956 and § 1957 money laundering offenses (App. 12-13),[6] the court of appeals

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[6] The court of appeals could hardly have concluded otherwise given the plain language of the statutes. *See* 18 U.S.C. § 1956(a)(1) and § 1957(a).

nonetheless held that the trial court's wholesale failure to provide these elements to the jury was not error.[7] This ruling conflicts directly with the petitioner's contention in *Johnson*, who not only alleges that such a failure is error, but also that it is "structural" error which requires reversal on appeal under all circumstances.

Given that this Petition presents almost precisely the same issue that is before the Court in *Johnson*, Petitioner requests that the Court grant certiorari in this case also.

CONCLUSION

For the foregoing reasons, petitioner Ronald W. Hughes, Sr. respectfully requests that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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[7] The trial court's failure to submit these elements to the jury was tantamount to affirmatively taking those elements away from the jury, and deciding them by the court, which is exactly what occurred in *Gaudin*.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10861

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RONALD W. HUGHES, SR.,

BETTY L. ALLEN,

and

JERRI D. ALLEN,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(3:94-CR-075-X)

Before POLITZ, Chief Judges SMITH, and DUHE', Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Ronald Hughes, Sr., Betty Allen, and Jerri Allen appeal their convictions and sentences for conspiracy to launder money and for individual acts of money laundering. Finding no error, we affirm.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I.

Ronald Hughes, Sr. ("Hughes"), ran his family's funeral home business near Dallas. In June 1989, Hughes was visiting with Harry Pierce, an old acquaintance who was at the time doing odd jobs for Hughes, at the site of a church in Cedar Hill, Texas, that Hughes had purchased recently and intended to convert into a funeral home. At this meeting, Pierce asked whether Hughes knew "where a person could invest some money on a long-term basis and where they could earn some interest." Pierce stated that he knew Betty Allen ("Allen"), who had about $1 million that she was looking to invest. Hughes responded that he was in fact looking for approximately that amount to complete the financing on his new funeral home conversion project.

Shortly thereafter, Pierce arranged a meeting with Hughes and Allen, at which meeting Allen agreed to loan Hughes $1 million. Allen related to Hughes that the money had come from a now-deceased, former lover (Joe Brown) who had been distrustful of banks and who liked to keep large sums of cash around. Hughes and Allen closed the loan transaction on July 1, 1989, and a local attorney prepared the necessary documentation. Allen instructed the attorney to make the note payable to Allen and Robert Chambers, explaining that Chambers was a friend of hers and Joe Brown's who had an interest in the money that Brown had left her.[1] At the behest of

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[1] Chambers, prior to his arrest in 1991, smuggled marihuana and cocaine into the United States from Mexico and Colombia. He was reportedly the last "soldier" left in the Pablo Acosta drug organization. According to the government,

Hughes's attorney, Allen also provided Hughes with a written statement representing that none of the loan proceeds was derived from illegal activity. Hughes and Allen agreed that the money – all delivered in cash – would be deposited in increments of less than $10,000 each. Hughes proceeded to do this, making nearly 200 separate deposits of cash in eleven different financial institutions during the course of his dealings with Allen.

On July 20, 1989, Pierce telephoned Hughes and explained that Allen had asked Pierce to meet her in Scottsdale and then fly back with her to Dallas. Because he was unable to do so, Pierce requested that Hughes go in his place. Hughes agreed and flew the following day to Scottsdale aboard a chartered plane that had been arranged by Pierce.

Upon his arrival, Hughes met Allen, who said she needed him to accompany her on an errand, at which time the two drove to a storage facility in Phoenix and removed approximately $2 million in cash from a safe located in the facility.[2] Hughes and Allen returned with the money to the Scottsdale airport and flew to Dallas,

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Chambers gave some of the currency that he earned in this drug trade to Allen so that she could help him hide the money. After his arrest and conviction, Chambers entered into a plea bargain and agreed to testify against Allen and company in this action in exchange for leniency in sentencing.

[2] The parties contest ownership of the money. According to Hughes, Allen indicated that the money had been placed in the safe. Allen maintains, however, that the money came from Joe Brown. The government contends that the money belonged to Chambers and had been placed with a girlfriend of Chambers's in Phoenix prior to its being moved to the storage facility.

whereupon Hughes delivered the money, per Allen's instructions, to Pierce's apartment.

Hughes subsequently received a second call from Allen in which she indicated that she had an additional $1.9 million to invest with Hughes.[3] The money that formed the basis of this second loan had been brought from Alpine, Texas, by Pierce, Allen, and Jerri Allen ("Jerri"), Allen's daughter. The three passengers had flown to Alpine aboard Allen's airplane, where a pickup truck pulled up to the plane and loaded the money aboard in trunks and bags. Hughes met the group at the Dallas airport upon their return and took the money – again all of it in cash. The note evincing this loan transaction was executed on November 1, 1989.

Although it is undisputed that Chambers came to Dallas on August 8, 1989, to meet with Hughes, the parties dispute virtually every facet of the meeting. The government claims that at this meeting Chambers told Hughes that the money belonged to him and that he had had an extensive relationship with Acosta and was "the last soldier left in the [Acosta] organization." According to the government, Hughes then told Chambers that he had had a former FBI agent friend of his run a check on Chambers and that this friend would help them stay apprised of whether the IRS was conducting any money laundering investigations in the area.

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[3] None of the parties contests the amount of the loan, although the second note reflects only that $1 million was loaned to Hughes.

Hughes contests this account, saying that Chambers told him that he was a former Green Beret who had done a few favors for Mexican law enforcement personnel. Although Hughes does not dispute that he told Chambers that he had run an FBI check on him, Hughes claims that he never did so and was only making comments to that effect to "level the playing field." Hughes also points out that the former FBI agent testified at trial that he had not run such a check until April 1990. Hughes does concede, however, that Chambers indicated that the money was his, that he had once worked for a man named Pablo Acosta, that he had inherited Acosta's turf, and that Acosta was "like a godfather" to him.

Hughes had no further contact with Chambers until April 1990, when the two met with Allen and Jerri. Ostensibly, the meeting was called to figure out where all the money (nearly $5 million in total) had gone and who was responsible. The meeting degenerated into a shouting match between all of the parties and was followed by Chambers's mad search through a mausoleum owned by Hughes in which Chambers believed that Allen and Hughes had hid the money. To everyone's knowledge except Hughes, the meeting was recorded on audio tape.

Chambers was arrested in 1991 and, after being convicted, agreed to testify in the instant case in exchange for leniency in sentencing. Hughes was charged with various counts of money laundering and structuring, Allen with various counts of money laundering, Hughes's son with various counts of structuring, and Jerri with two counts of structuring and one count of money laundering. Hughes, Allen, and Jerri also were charged with conspiracy to launder.

Hughes was convicted by a jury on all but one of the laundering charges and acquitted on all of the structuring charges. Allen was convicted on all counts, while Jerri was convicted only on the laundering counts. Hughes's son was acquitted on all charges.

II.

A.

Hughes, Allen, and Jerri first contend that the district court erred in failing to instru the jury that, as to the money laundering counts, the government was required to show that each possessed actual knowledge that the funds involved in those counts were the product of criminal activity. According to the defendants, the court's failure to adopt their instruction permitted the jury to convict upon a showing of the lesser standard of constructive knowledge.

We review the district court's decision for abuse of discretion. *United States v. Sellers*, 926 F.2d 410, 414 (5th Cir. 1991). The refusal to give a jury instruction constitutes reversible error only where the instruction (1) was substantially correct, (2) was not substantially covered in the charge delivered to the jury, and (3) concerned an important issue so that the failure to give it seriously impaired the defendant's ability to present a given defense. *United States v. Pennington*, 20 F.3d 593, 600 (5th Cir. 1994).

The defendants' proposed instruction was substantially correct.[4] The government does not dispute that "actual knowledge" that the proceeds of unlawful activity were involved in the laundering is an element of the crime. Actual knowledge requires at a minimum a showing of the defendant's subjective belief that the fact at issue existed. *See United States v. Breque*, 964 F.2d 381, 389 (5th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). The defendants' jury instruction elucidated as much and thus was substantially correct.

We conclude, however, that the defendants' proposed instruction was substantially covered in the charge delivered to the jury. The actual charge given was as follows:

> In order to establish a violation of the statute, the government must prove beyond a reasonable doubt . . . *Second*: That the Defendant under consideration *knew* that the property involved in the financial transaction represented the proceeds of some form of unlawful activity. . . . The phrase "knowing that the property involved in the financial transaction represented some form of unlawful activity" means that the person *knew* the property involved in the transaction represented the proceeds from some form,

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[4] The proposed instruction was as follows: "In order to find that the defendant whom you are considering believed that the property involved was the proceeds of one or more forms of unlawful activity, as set forth above, you must be convinced beyond a reasonable doubt that the defendant actually believed that proceeds of unlawful activity were involved. Reason to know, carelessness, suspicion, or even reckless disregard of the facts that the proceeds of unlawful activity were involved is not enough to satisfy the standard."

> though, not necessarily which form, or activity that constitutes a felony under State or Federal law. . . . [The government] need only prove that he or she *knew* that it represented the proceeds of some form, though not necessarily which form, of felonious activity under State or Federal law. [Emphasis added.]

The statute requires that the government prove actual knowledge, and the court so instructed the jury, using the word "knew" three times in two paragraphs of the instruction. The court did not instruct that the government could prevail by demonstrating that the defendants "should have known" that the money was criminally tainted, and we do not conclude from the court's failure to define the term "knew" that the jurors were permitted implicitly to assign guilt based upon a "should have known" standard.

"Terms which are reasonably within the common understanding of juries, and which are not technical or unambiguous, need not be defined in the trial court's charge." *United States v. Anderton*, 629 F.2d 1044, 1048-49 (5th Cir. 1980) (citation omitted). "Knew" is such a self-defining term, and, when used in common parlance, connotes actual or direct cognition, not constructive awareness attributed to an individual because of his own negligence, gross negligence, or recklessness. Irrespective of whether it is in fact "better practice . . . to instruct the jury on the meaning of all terms of operative significance, even if they are in ordinary parlance," *id.* at 1049 n.5 (citation omitted), we find no error in the instant instruction.

B.

Jerri next challenges the jury instruction on the § 1957 money laundering charge stemming from the purchase of her $90,000 home with monies that the government alleges were criminally derived (Count 15). According to the government, Allen gave Jerri $90,000 in drug-tainted money with which to purchase a home, which money Jerri deposited in amounts less than $10,000 each and then drew cashier's checks on in similar amounts.

The court instructed the jury that, in addition to the other four elements that they were required to find in order to convict, they must also find "[t]hat the monetary transaction was of a value greater than $10,000; [and] Fourth: That the criminally derived property was in fact derived from the specified unlawful activity of importation, sale or distribution of cocaine." Jerri contends, and the government concedes, that the instruction wrongly informed the jury that they must find only that the *monetary transaction in which the criminally derived monies were used* was in excess of $10,000, where in fact a correct statement of the law would require that the jury find that the *amount of criminally derived money used in the transaction* must exceed $10,000.

As Jerri failed to object timely, we review for plain error. *United States v. Restivo*, 8 F.3d 274, 278-79 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 54 (1994). Because the government concedes error – "a deviation from a legal rule in the absence of a valid waiver," *United States v. Calverley*, 37 F.3d 160, 162 (5th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1266 (1995) – and that such error was in fact plain –

so obvious that the trial judge and prosecutor were derelict in countenancing it, *see United States v. Frady*, 456 U.S. 152, 163 (1982), we need not determine whether Jerri's construction of § 1957 comports with its statutory meaning. We will exercise remedial discretion where the plain error affects substantial rights and where the defendant carries her burden to show that the error was prejudicial, affecting the outcome of the proceeding. *Calverley*, 37 F.3d at 164 (citation omitted).

Jerri argues that the instruction was indeed prejudicial because the government presented at trial only one cashier's check that was allegedly used in the purchase of her $90,000 home and that had any clear derivation from illicit funds. That check, in the amount of $8,000, listed Pierce as the remitter. Jerri thus contends that there is a substantial likelihood that the jury wrongly convicted her on Count 15 based upon the $90,000 purchase price of the home and that a different result would have been obtained had the jury been instructed to focus on the $8,000 cashier's check only.

Jerri's own discussion of the facts of this case, however, undermines this argument. Even if we assume that only this single cashier's check had any derivation from criminal activity, Jerri admits that she made currency deposits (the subject of a separate structuring charge) over the course of a month from which she was able to pay the remaining $36,455.85 due on her home. It was precisely the criminal origin of these cash transactions that the government also presented to the jury in arguing for Jerri's conviction on the § 1957 charge.

Even though we acknowledge that Jerri disputes vigorously the notion that this cash was criminally tainted, this argument is unavailing to an inquiry of prejudice on the jury instruction. That is, the jury's decision to convict Jerri on the § 1957 charge hinged upon its belief or disbelief that Jerri knew that the minimum amount of $44,455.85 that the government contended was criminally tainted was in fact tainted. The correctness of the jury's decision is not properly at issue under our review of the court's erroneous jury instructions,[5] and, because the government's case posited that monies at least in excess of $10,000 were used in the purchase of Jerri's home, we find no prejudice.

C.

Hughes, Allen, and Jerri also assert as error the district court's failure to instruct the jury on the elements of the specified unlawful activity – the importation, sale, or distribution of cocaine – that formed the predicate act of the money laundering charges. They do not suggest that the court failed to instruct the jury that a finding of the specified illegal activity was required to establish proof of the money laundering claim,[6] but rather assert that the

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[5] Jerri properly raises these concerns in her appellate issues dealing with the actual knowledge instruction and the sufficiency of the evidence presented to prove knowledge.

[6] Even assuming that the defendants have raised this argument on appeal, we would review it under a plain error standard. Nowhere in Hughes's citations to his proposed jury instructions, by which he requested that the elements of the illegal activity be read to the jury, did he propose that the court specifically instruct the jury that they must find each of these

court's failure to enumerate the elements of the activity prohibited the jury from making the appropriate finding. We review the court's failure to adopt the defendants' proposed jury instruction under the *Pennington* test described above.

Assuming *arguendo* that the proposed instruction was a correct statement of law, we conclude that it was covered sufficiently in the court's instruction. The court instructed that it must find "[t]hat the property involved in the financial transaction did in fact represent the proceeds of some specified unlawful activity," defining "specified unlawful activity" as "any activity relating to the sale and distribution of controlled substances." The court further remarked that "I advise you that the importation, sale, or distribution of cocaine is a felony under federal law." Given that the drug traffickers themselves were not on trial and that the instructions track the statutory language and embody all of the essential elements of the crime, the instructions incorporate the defendants' proposed instruction substantially. *See United States v. Golb*, 69 F.3d 1417, 1429 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1369 (1996).

The defendants' citations to *United States v. Lovett*, 964 F.2d 1029 (10th Cir.), *cert. denied*, 506 U.S. 857 (1992), and *United States v. McDuff*, No. 94-20076 (5th Cir. Mar. 12, 1996) (unpublished), do not convince us otherwise. *Lovett* addresses whether a charge under the money laundering statutes, once the defendant has been convicted of

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elements in order to find that the illegal activity occurred. Rather, Hughes asked that the elements be read in connection with the mental state requirement of actual knowledge.

the predicate crime, raises a double jeopardy question. The court mentions in *dicta* only that the elements of the predicate crime are elements of the money laundering crime, but says nothing about the sufficiency of jury instructions in a money laundering case. *See Lovett*, 964 F.2d at 1041-42.

McDuff is also distinguishable, both because the predicate act was bank fraud, a crime for which, unlike cocaine importation and distribution in the instant case, most jurors would require a precise explication of the elements, and because the district court in *McDuff* never even mentioned the predicate act in the instructions on the money laundering claims. *Id.* at 8 ("FOURTH, the criminally derived property must also, in fact, have been derived from a specified unlawful activity."). In contrast, the court in the instant case made clear to the jurors that the predicate act was cocaine importation and distribution.

Finally, even if we assume that the defendants have satisfied the second prong of the *Pennington* test, they have not demonstrated that the court's failure to give the instruction seriously impaired their ability to present a defense that the predicate crime had not in fact occurred. In fact, the only dispute was whether the money at issue had come from the specified unlawful activity, not whether the specified unlawful activity actually had occurred. In rejecting the defendants' proposed instruction, the court remarked:

> [S]muggling drugs and importing cocaine, is not a concept that I think is so foreign that you would have to sit and quote verbatim every statute that deals with that. . . . I mean, there is

> supposed to be some common sense in this, and the purpose of the jury charge is to tell people what the law is so that they can make a common sense factual determination, not to mire them.

We can find no evidence that raises any doubt that the jury would have found differently on the laundering claims had the elements been spelled out explicitly. In fact, we agree with the district court that doing so would "confuse them and . . . make their factfinding mission more difficult by obfuscating common sense determination of the facts."

III.

Each of Hughes, Allen, and Jerri next contends that because there was insufficient evidence, the district court erred in allowing the money laundering claims to go to the jury. In particular, the defendants allege that the government presented insufficient evidence of their actual knowledge of the criminal taint of the money involved. In deciding whether there was sufficient evidence to support the verdict, we view the evidence and the inferences that may be drawn in the light most favorable to the verdict and determine whether a rational jury could have found the essential elements of the offenses beyond a reasonable doubt. *United States v. Bustamente,* 45 F.3d 933, 936 (5th Cir.), *cert. denied,* 116 S. Ct. 473 (1995). The jury is free to choose among reasonable constructs of the evidence, which need not exclude every reasonable hypothesis of innocence. *Id.* Furthermore, we accept all credibility choices that tend to support the verdict. *United States v. Gallo,* 927 F.2d 815, 820 (5th Cir. 1991).

A.

Hughes first challenges the sufficiency of the knowledge evidence with respect to Counts 4 (the July 21 Phoenix money pickup) and 5 (the August 1 secondary loan of $1.9 million from Allen). Hughes contends that, because he did not meet with Chambers until August 8, a rational jury could not have found that he knew about the illegal origin of the monies prior to that time. The government points us to several pieces of evidence from which it contends that the jury could have inferred that Hughes had actual knowledge of the criminal source of the funds, including Hughes's structuring activity that began almost immediately after his receipt of the initial $1 million, the fact that the proceeds of the loans were delivered in cash, Hughes's traveling with Allen to Phoenix to pick up nearly $2 million in cash from a storage facility, and the jury's disbelief of Allen's Joe Brown story.

According to Hughes, the jury could not have ascribed any significance to the structuring because the jury declined to convict Hughes on Count 2 (the original $1 million loan from Betty Allen on June 27) but so convicted him on Count 4 (the $2 million Phoenix incident on July 21), notwithstanding the fact that the jury was aware that Hughes began making structuring transactions almost immediately after receiving the first $1 million. Had the jury found the structuring important, Hughes asserts, it would have convicted on Count 2 as well. We disagree.

Hughes's suggestion misunderstands the application of a money laundering charge to the events in question. The government properly noted in the indictment, and

the court so instructed the jury, that Hughes could be found guilty of Count 2 only if he knew of the illegality of the proceeds *at the time of his receipt of the money.* Had the jury determined solely from the structuring evidence, all of which followed in time the June 27 receipt of $1 million, that Hughes had actual knowledge of the illegal source of the money at the time that he received the money, the jury would have been concluding, impermissibly, that Hughes should have known at the time he accepted the money that it was from an illegal source, because actions that he took subsequent to the receipt evinced such knowledge, *not* that he actually knew of its illegality at the time of receipt. Rather, the first time the jury could have considered properly the structuring evidence was in their deliberations on Count 4, not Count 2.

Thus, the government notes correctly that, with respect to all counts that temporally followed Count 2, it posited a theory from which the jury could infer actual knowledge of the illegality of the proceeds – evidence of Hughes's structuring – and that Hughes's failure to debunk this theory when he took the stand entitled the jury to make such an inference.[7] We agree that Hughes's

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[7] Hughes, as do Allen and Jerri, notes that there are a number of innocent reasons why one might wish to make deposits in such a way, and thus we should not allow the jury to conclude that the structuring evinced knowledge of the illegality of the proceeds. In fact, the defendants contend that *Ratzlaf v. United States*, 510 U.S. 135, 144-45 (1994), expressly acknowledges that structuring is "not inevitably nefarious." The Ratzlaf Court invoked such language, however, in response to the government's suggestion that it need not prove willfulness to sustain a conviction under 31 U.S.C. § 5324. We find nothing in Ratzlaf that would prohibit a prosecutor in an 18

failure to present the jury with a competing explanation for the structuring entitled the jury to infer that his reason for so doing was to avoid government scrutiny about the illicit source of money.

In addition to Hughes's structuring, the jury also could have inferred knowledge from the all-cash nature of the transactions, Hughes's accompanying Allen to a storage warehouse in Phoenix wherein they found $2 million in cash that Hughes brought to Dallas, and the jury's own disbelief of Allen's Joe Brown story. Whether the jury believed, as Hughes wanted them to, that "[a]dmittedly, the July 21, 1989 "Phoenix Incident" was somewhat out of the ordinary" and that "Hughes was perhaps a bit naive in accepting that [Joe Brown] story, and perhaps (in twenty-twenty hindsight) he should have gone to greater lengths to verify its validity," turned upon its assessments of witness credibility and the weight of the evidence, functions that are well within the province of the factfinder and that are beyond the scope of our review on appeal. We find that a rational jury could have made such decisions in the instant case.[8]

U.S.C. § 1956 case from introducing structuring activities to evince a defendant's knowledge of the illegality of the monies being structured. The defendants had every opportunity to debunk the government's theory, and they may not now raise on appeal an alternative explanation for the structuring.

[8] Because we find sufficient evidence to affirm on Counts 4 and 5, each of which occurred prior to the August 8 meeting with Chambers, we need not address Hughes's sufficiency claims with respect to the subsequent counts. We note briefly, however, that, notwithstanding the variance between the parties' accounts of the meeting, Hughes does admit that at a minimum Chambers did indicate that the money belonged to

B.

Allen also challenges the sufficiency of the evidence to support the finding that she had knowledge of the criminal origin of the money. Allen notes correctly that Chambers testified that he never actually told her that his money was drug-tainted, and thus she concludes that the jury should have believed her Joe Brown story. What Allen neglects, however, is the additional evidence that Betty knew that Chambers had a drug problem, that she had testified at his detention hearing in May 1989, during which time allegations of his drug dealing were made in her presence, that she held large sums of cash for Chambers in a safe in her house, that she instructed Hughes to structure his loan deposits, and that she had traveled with Hughes to Phoenix to collect $2 million in cash from a storage facility and with Jerri and Pierce to Alpine to collect an additional $1.9 million in cash. Whether, in light of this additional circumstantial evidence of knowledge, the jury disbelieved the Joe Brown story is beyond the scope of our review. A rational jury could have found sufficient evidence of knowledge beyond a reasonable doubt.

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him, that he had once worked for a man named Pablo Acosta, that he had inherited Acosta's "turf," and that Acosta was "like a godfather" to Chambers. A reasonable jury could have inferred from this additional evidence, when considered in light of the previous evidence of knowledge, that Hughes had knowledge of the illegality of the proceeds.

C.

We similarly reject Jerri's sufficiency challenge.[9] Again, Jerri contends that Chambers's testimony that he never told her that he was in fact a drug dealer compels a reversal. The evidence did establish, however, that Jerri was aware of the large sums of Chambers's cash being stored in her mother's home, that she opened the safe on at least two occasions to allow Chambers to withdraw money, that she accompanied her mother and Pierce on the Alpine plan trip to pick up the $1.9 million in cash, and that she purchased a new home with monies that she had previously structured. Jerri did attempt to explain away her behavior with regard to her house purchase by eliciting testimony from Allen regarding the derivation of

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[9] As a preliminary matter, we must decide whether Jerri's sufficiency claim should be reviewed with reference to the evidence presented in the government's case-in-chief only or with reference to the additional testimony elicited by Jerri from Allen and her brother. Where a defendant rests his case at the end of the government's case-in-chief, a reviewing court may consider the sufficiency of the evidence solely from the evidence presented in the government's case-in-chief. *See United States v. Casilla*, 20 F.3d 600, 606 (5th Cir. 1994). Sufficiency review is similarly constrained where a defendant rebuts testimony offered against him by another co-party, without attempting to rebut the government's case-in-chief. *See United States v. Belt*, 574 F.2d 1234, 1237 (5th Cir. 1978). Where, however, a defendant introduces co-party testimony intended to exculpate him and uses that testimony in closing argument to support his case, a reviewing court may review all of the evidence presented. *See United States v. Cardenas Alvarado*, 806 F.2d 566, 570 n.2 (5th Cir. 1986). Because Jerri elicited testimony from Allen and her brother that was intended to exculpate her, and argued such evidence to the jury on closing, we may review all of the evidence presented.

the monies, and she also invoked Betty's Joe Brown story. Yet, as was the case with Allen, the jury was within its rights to disbelieve this story and to conclude, in light of the other evidence, that Jerri knew of the criminal source of the monies.

D.

Hughes and Jerri next challenge the sufficiency of the evidence presented to prove that the financial transactions at issue were designed "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B)(I). In so doing, they argue that we should look not to their own intent, but rather to the intent of Chambers. Because, they allege, it is undisputed that Chambers never intended to conceal in any way the proceeds of his alleged unlawful activity, they cannot be held liable for money laundering.

This objection is without merit, as the following exchange on direct examination between Chambers and the government illustrates:

> Q. And why did you start stashing your money in Marathon, Texas, with Betty Allen?
>
> A. Because I trusted her. She was my friend and I felt it was the safest place for my money at the time.
>
> Q. Did you have any intent to hide the money from law enforcement officers?
>
> A. Yes, ma'am.
>
> Q. And why is that, sir?

> A. Well, I wouldn't have any means to prove that it was mine.

The government need only prove that Hughes and Jerri were aware of Chambers's and Allen's intention to conceal or disguise the nature of the money, not that Hughes and Jerri themselves so intended. *See United States v. Campbell*, 977 F.2d 854, 858 (4th Cir. 1992), *cert. denied*, 507 U.S. 938 (1993). Additionally, the fact that Allen's and Chambers's names were listed on the promissory notes documenting the purported loan transactions does not undermine the government's case. *See Lovett*, 964 F.2d at 1034 n.3 (noting that the money laundering statute is "not aimed solely at commercial transactions intended to disguise the relationship of the item purchased with the person providing the proceeds; the statute is aimed broadly at transactions designed in whole or in part to conceal or disguise *in any manner* the nature, location, source, ownership or control of the proceeds of unlawful activity.). The jury was entitled to infer from the defendants' knowledge of the illegal source of the proceeds that they were aware of Allen's and Chambers's intent to conceal the monies. *See Campbell*, 977 F.2d at 858.

We disagree with defendants that *United States v. Dobbs*, 63 F.3d 391 (5th Cir. 1995), and *United States v. Gonzalez-Rodriguez*, 966 F.2d 918 (5th Cir. 1992), require anything different. In *Gonzalez-Rodriguez*, we reversed a money laundering conviction against the girlfriend of an alleged drug dealer because we noted that her disclosure to law enforcement officials that she was carrying $8,000 in cash followed by her turning the money over to the officials to count hardly evinced an intent to conceal or disguise the funds. *Id.* at 926. Where, as here, such intent

is present, *Gonzalez-Rodriguez* is inapposite. Similarly, *Dobbs* merely reiterates the general requirement that the government must prove that the transactions were designed at least in part to launder money, "or otherwise to conceal the nature of funds so that it might enter the economy as legitimate funds." 63 F.3d at 397. The government has met its *Dobbs* burden.

V.

A.

Hughes next challenges the enhancement of his sentencing offense by four levels under U.S.S.G. § 3B1.1(a). He asserts both that the district court erred because it failed to find that Hughes was a "leader or organizer" and because it had insufficient evidence to determine that the scheme was "otherwise extensive."

We review the factual finding that a defendant is a leader or organizer for clear error. *See United States v. Valencia*, 44 F.3d 269, 271-72 (5th Cir. 1995). "A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole." *Id.* at 272.

Section 3B1.1(a) has two requirements: (1) The defendant must have been an organizer or leader of one or more other participants in the criminal activity, and (2) the scheme must have either included five or more participants or been otherwise extensive. U.S.S.G. § 3B1.1(a). The commentary defines a "participant" as a person who is criminally responsible for the commission of the

offense, but who need not have been convicted. *Id.* commentary n.1.; *United States v. Gross*, 26 F.3d 552, 554-55 (5th Cir. 1994).

We do not find clear error in the conclusion that the criminal activities were "otherwise extensive." The court noted that the record reflected the participation of numerous people conducting numerous transactions, including structuring 199 deposits in more than eleven financial institutions over a seven-month period. In light of the record as a whole, the court's findings are more than plausible.

Similarly, we reject Hughes's argument that the court failed to make a finding that he was a leader or organizer of one or more criminally responsible persons. The court made an explicit finding of leadership: "So with regard to that, *as well as the direction that was being given*, I think the testimony specifically was that Ronald Hughes, Jr., was following orders of Ronald Hughes, Sr., as was Rhonda Hughes as well, in making these deposits." (Emphasis added.)

With respect to a finding regarding the criminal responsibility of those to whom Hughes gave directions, the district court adopted the presentence report ("PSR"), which contains a finding of criminal responsibility on the part of the Hughes children and the company comptroller. Specifically, the court stated, "All other objections affecting the guideline calculations are overruled, and I accept the presentence report and the addendums thereto." Although the finding could have been made

more specific, we do not see clear error in the determination of criminal responsibility.[10]

B.

Jerri objects to the district court's findings at her sentencing hearing. We have held that under the sentencing guidelines for conspiratorial conduct, a district court must find both (1) that the defendant agreed to undertake jointly criminal activities and that the particular crime was within the scope of that agreement and (2) that he could have reasonably foreseen the criminal activity. *See United States v. Evbuomwan*, 992 F.2d 70, 74 (5th Cir. 1993).

Although a court must make an express finding that the conspiratorial activity at issue satisfies these requirements, we nevertheless have rejected the proposition that the court must make a "catechismic regurgitation of each fact determined." *United States v. Sherbak*, 950 F.2d 1095, 1099 (5th Cir. 1992). Courts may adopt the findings of the PSR, but they must make it clear that they have so adopted the PSR, in order that the reviewing court is not left to second-guess the basis for the sentencing decision. *United States v. Carreon*, 11 F.3d 1225, 1231 (5th Cir. 1994).

We disagree with Jerri that the court failed to make findings that the monies attributed to her were within the

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[10] Hughes relies on *United States v. Ronning*, 47 F.3d 710 (5th Cir. 1995), to argue that as a matter of law he could not have been an organizer or leader. In *Ronning*, however, we said only that an organizer or leader, in order to be so classified, must control or influence other people. *Id.* at 712. The district court so found that Hughes acted as a leader with respect to Hughes, Jr., and this finding is not clearly erroneous.

scope of the agreement and were reasonably foreseeable to her. The probation office, in preparing the PSR, enhanced Jerri's sentence based upon her participation in the conspiracy to launder in excess of $3.5 million. In a written objection to the PSR, Jerri argued that she should not be held accountable for that entire amount, but rather that her liability was limited to the $90,000 used in the purchase of her home. The probation office, in response, filed a written addendum noting that the court was entitled to make such a finding, but, in any event, Jerri would not be entitled to a role reduction. The district court at the sentencing hearing explicitly adopted the PSR and the addendum and entertained Jerri's objections.

Jerri again argued at the hearing that her responsibility was limited to the $90,000 home purchase "although she assisted her mother by attending that [August 8 Chambers] meeting much later after all the events were pretty well concluded." After a long colloquy with Jerri and with the government, the court finally overruled Jerri's objections, noting:

> I find the tape recording, clearly that alone – plus there was other evidence in this case. As I recall, there was the Sons of the West theater and the involvement with that.
>
> And, again, her participation, which certainly the participation in the discussion on that tape, as I recall it, would not be considered minimal. I mean, I seem to recall she was a player in the conversation.

The court's findings are not clearly erroneous. We agree with the government that "while the finding is not

a model of clarity, it is plain enough when read in context" and demonstrates attention to the two *Evbuomwan* factors. Unlike the court in *Hooten*, 942 F.2d at 881, which summarily refused to address the defendant's objections to the PSR and thereby left no basis for the appellate court to review its factual findings, the instant court entertained Jerri's objections and ultimately found them factually erroneous. Thus, with an ample predicate for the court's findings on record, we find no clear error.

C.

Finally, Jerri argues that although the jury found that she knew the monies were derived from *some* specified unlawful activity, it never found expressly that she knew that the monies were derived from the importation, sale, or distribution of narcotics. Thus, she asserts, the enhancement of her sentence for involvement with narcotics or controlled substances is clearly erroneous. The PSR addressed this argument in a written addendum, noting that each of Count 1 and Count 15 under which Jerri was convicted required that the jury find that Jerri had knowledge that the source of the monies was from "some specified unlawful activity, that is, the sale and distribution of narcotics." Furthermore, the PSR made its own factual findings in this regard, pointing to the evidence in the record to support Jerri's awareness of the drug taint of the money.[11]

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[11] Jerri cites *United States v. Medina*, 992 F.2d 573, 591 (6th Cir. 1991), *cert. denied*, 510 U.S. 1109 (1994), incorrectly to require in all cases that the district court (or PSR) make factual findings independent of the jury's findings. This reading is simply

As noted above, the district court need not undertake a "catechismic regurgitation of each fact determined," *Sherbak*, 950 F.2d at 1099, but may adopt the factual findings of the PSR. The court so adopted the PSR in the instant case, and we do not see clear error in its factual conclusions.

The judgments of conviction and sentence are AFFIRMED.

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erroneous. Medina notes only that the jury's decision to convict a defendant, based in part upon their disbelief of the credibility of his testimony, is an insufficient basis upon which the sentencing court may then apply an obstruction of justice enhancement for perjury. *Medina* does not require generally that such independent findings must be made, but only that the court must do so where the jury's verdict is insufficient to meet the burden of proof required for the alleged enhancement.

EXCERPT FROM PETITIONER HUGHES' OPENING BRIEF TO THE COURT OF APPEALS

* * *

II. ALL OF DEFENDANT HUGHES' CONVICTIONS SHOULD BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING THAT HE POSSESSED ACTUAL KNOWLEDGE THAT ILLEGAL DRUG PROCEEDS WERE INVOLVED.

At the close of the government's evidence, Hughes moved for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. (8T at 3-8). The court denied the motion. (8T at 8). Mr. Hughes reurged this motion at the close of all evidence, and again the court denied the motion. (11T at 66-67). Hughes' sufficiency of the evidence claim, therefore, is reviewed taking the evidence in the light most favorable to the government, drawing all reasonable inferences in support of the verdict. *United States v. Pennington*, 20 F.3d 593, 597 (5th Cir. 1994) (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). However, "if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, the conviction should be reversed." *Id.* (citing *United States v. Menesses*, 962 F.2d 420, 426 (5th Cir. 1992)) (citations omitted).

Under this standard, all of Hughes' convictions must be reversed. Each of the counts upon which he was convicted – the money laundering conspiracy count (Count 1), the money laundering counts (Counts 4 & 5),

and the criminally derived property counts (Counts 7 & 16) – required proof beyond a reasonable doubt that he possessed actual knowledge that the funds he was dealing with were the proceeds of illegal drug activity. *See supra* pp. 21-22. As shown below, the evidence was insufficient to support a finding, beyond a reasonable doubt, that he had such knowledge, even considering the evidence in the light most favorable to the government.

* * *

[SEAL] **U.S. Department of Justice**

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October 11, 1996

Honorable Henry A. Politz, Chief Judge
Honorable John M. Duhé, Jr.
Honorable Jerry E. Smith
United States Court of Appeals
for the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

RE: **No. 95-10861, United States v. Ronald Hughes, Sr. et al.**

To The Honorable Court:

This letter brief is submitted in accordance with the Court's instructions at oral argument in Lubbock on October 3, 1996.

I. The government had only to prove knowledge of some unlawful activity, not knowledge of specified unlawful activity.

The money laundering statute at issue provides, in relevant part:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds

> of *some form of unlawful activity,* conducts or attempts to conduct such a financial transaction which *in fact involves the proceeds of specified unlawful activity* –
>
> knowing that the transaction is designed in whole or in part –
>
> to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;

commits an offense against the United States. 18 U.S.C. § 1956(a)(1)(B)(i) (emphasis added).

In subsection (c)(1) of the statute, the phrase "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" is defined to mean "that the person knew the property involved in the transaction represented proceeds from some form, although not necessarily which form" of felonious activity. 18 U.S.C. § 1956(c)(1).

This statute has been uniformly interpreted, consistent with its plain language, to require that a defendant be shown only to have knowledge that some form of illegal activity generated the funds being laundered. He does not have to know exactly what felony gave rise to the proceeds, or that it was a "specified unlawful activity," such as drug trafficking. *E.g., United States v. Giraldi,* 86 F.3d 1368, 1372 (5th Cir. 1996); *United States v. Carr,* 25 F.3d 1194, 1204 (3rd Cir. 1994), *cert. denied,* 115 S.Ct. 742 (1995); *United States v. Campbell,* 977 F.2d 854, 858 (4th Cir. 1992), *cert. denied,* 507 U.S. 938 (1993). Hughes conceded as much during the charge conference in this case. (R. 24/51-52, 53-54.)

While counsel for Mr. Hughes contended at oral argument that the government did not raise this point in the briefs, that is not so. The argument was set forth clearly at page 17, footnote 6, of the government's initial brief.

In the factual context of this case, the point is of some importance. There was no evidence that Mr. Hughes was expressly told that Robert Chambers was a drug dealer. There was ample circumstantial evidence, however, from which the jury could conclude that Hughes knew there was *something* illegal about the money. According to *Turner v. United States*, 396 U.S. 398, 416 n.29, 90 S.Ct. 642, 652 n.29 (1970), cited by Hughes in his initial brief, knowledge of such a fact "is established if a person is aware of a high probability of its existence, unless he actually believes it does not exist." [Citation omitted.]

The most important pieces of evidence in support of Hughes' knowledge are that although the enormous amounts of cash, in small bills, came from Betty Allen, Hughes knew the money belonged at least in part to Chambers. (R. 16/131; 17/102.) He said he had checked Chambers out through the FBI, and Chambers testified that he was then on probation and under indictment and that the FBI would have had information on him. He also testified that he told Hughes of his relationship with Pablo Acosta in Mexico, who had died in a violent gun-fight, that he (Chambers) was the only soldier left alive from Acosta's organization, and that he'd inherited Acosta's "turf." (R. 14/117, 121-9, 138.) Moreover, Hughes told Harry Pierce that he intended to put the cash into the bank a little at a time (which he did), and to say that it came from funerals that had been paid for in cash.

(R. 15/231.) Hughes paid Pierce a $100,000 fee for introducing him to Betty Allen and facilitating the first $1 million loan, and another $50,000 in connection with a later loan. (R. 15/232-3, 239.) Hughes kept all information about the cash, and how he disposed of it, off of his personal financial statements. (R. 18/57-59.) In the light of the whole record, the jury was entitled rationally to conclude that Hughes knew he was dealing in dirty money of some kind.

Hughes himself admitted that by the time he and Betty Allen picked up about $2 million in cash from a safe in Phoenix, he suspected the money to be drug proceeds. In that respect, the case is factually similar to *Campbell, supra,* where the defendant realtor made a remark indicating her belief that money involved in a real estate transaction "may have been drug money." 977 F.2d at 859. The *Campbell* defendant's conviction was upheld, and Mr. Hughes' conviction should likewise be affirmed.

* * *

Respectfully submitted,

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/s/ Susan Cowger
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PETITIONER HUGHES' REQUESTED JURY INSTRUCTION WITH RESPECT TO REQUIREMENT THAT GOVERNMENT PROVE THAT "SPECIFIED UNLAWFUL ACTIVITY" WAS SOURCE OF FUNDS AT ISSUE

* * *

I instruct you that you may not find Defendant Ronald W. Hughes, Sr. guilty unless you find beyond a reasonable doubt that the property, monetary instruments, or funds involved were obtained from the sale and distribution of narcotic drugs and controlled substances, in violation of **[THE COURT IS REQUESTED TO LIST HERE THOSE STATUTES WHICH THE GOVERNMENT ALLEGES WERE VIOLATED THROUGH "THE SALE AND DISTRIBUTION OF NARCOTIC DRUGS AND CONTROLLED SUBSTANCES" AS ALLEGED IN THE INDICTMENT]**. I will now instruct you in detail about each of these provisions of law.

[THE COURT IS REQUESTED HERE TO READ TO THE JURY THOSE STATUTES WHICH THE GOVERNMENT ALLEGES WERE VIOLATED THROUGH "THE SALE AND DISTRIBUTION OF NARCOTIC DRUGS AND CONTROLLED SUBSTANCES" AS ALLEGED IN THE INDICTMENT].

[THE COURT IS REQUESTED HERE TO READ TO THE JURY THE ELEMENTS OF THOSE CRIMINAL OFFENSES WHICH THE GOVERNMENT ALLEGES CONSTITUTE "THE SALE AND DISTRIBUTION OF NARCOTIC DRUGS AND CONTROLLED SUBSTANCES" AS REFERRED TO IN THE INDICTMENT].